Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 19.

WILLIAM WHEELER HUBBELL, APPELLANT,

vs.

THE UNITED STATES.

PETITION FOR REHEARING.

And now comes the appellant, William Wheeler Hubbell, by his attorney, and petitions this honorable court for leave to file this his petition for a rehearing of the above-entitled cause, heretofore decided at the present term of the court.

As grounds for such motion petitioner respectfully represents that there is error in the opinion and judgment of this honorable court in the following particulars, to wit:

First. In the misstatement of the claim of the patent in suit by omitting therefrom a vital element of the invention, to wit, the anvil over the fulminate.

Second. In the interpretation of the claim of the patent by holding that during the pendency of the application for

patent the claim as originally made was narrowed in scope, and therefore not entitled to a liberal interpretation.

I.

In stating the claim of the patent in suit at page 4 of the pamphlet edition of its opinion the court omits to mention the anvil as an element of the combination.

The claim of the patent and the claim as stated in the decision are here placed in parallel columns, the italics in the first column being the words omitted by the court.

CLAIM OF PATENT.	CLAIM AS STATED BY THE COURT.
In the bottom of a solid metallic-flange cartridge case or shell, the combination of a circular base inclosing a central chamber of fulminate *and an anvil over the fulminate* provided with two or more openings whose inner edges nearly coincide with the edges of the central chamber of fulminate in the base of the cartridge, substantially as described.	In the bottom of a solid metallic-flange cartridge case or shell, the combination of a circular base inclosing a central chamber of fulminate provided with two or more openings, whose inner edges nearly coincide with the edges of the central chamber of fulminate in the base of the cartridge, substantially as described.

II.

The court in its decision holds that the claim of the patent was narrower in scope than the claims originally presented in the application.

It is respectfully submitted that this is error.

The original application embodied three claims. The first specifically defined the anvil plate by letter of reference, and described its construction as consisting of a central solid resisting piece *i*, and two or more side perforations *k k*, substantially as described.

Under the rulings of this court, the expression "substantially as described" refers back to the description contained in the specification.

Seymour *vs.* Osborne, 11 Wall., 516.

Railroad Co. *vs.* National Car Brake Co., 110 U. S., 229.

That description defines the side perforations as having the relation to the fulminate chamber set forth in the claim of the patent.

The second claim identified the anvil plate by reference letter, and its specific construction is embodied in said claim by the expression "constructed as described." This claim also included specifically the fulminate-carrying disc in a metal solid fire-tight case.

The third claim, which is quoted by the court (page 5 of its decision), as the ground for the holding that the claim of the patent is narrower in scope than the original claims, embraced a circular metallic tight-fitting plate perforated into a central fulminate chamber, *leaving a central solid or unperforated bar over the fulminate chamber.*

This claim, in specifying the anvil plate as being perforated into a CENTRAL fulminate chamber and as leaving a central solid or unperforated bar over the fulminate chamber, is no more comprehensive in scope than the claim of the patent as granted, which specifies an anvil over the fulminate provided with two or more openings whose inner edges nearly coincide with the edges of the central chamber of fulminate, since *it would be impossible to construct an anvil plate having the characteristics specified in the original third claim without also having present the characteristics called for by the claim of the patent.*

THE UNDERLYING FEATURE OF THE INVENTION IS A SOLID ANVIL DIRECTLY OVER THE FULMINATE WITH SIDE OPENINGS THROUGH WHICH THE FORCE OF THE EXPLODED FULMINATE MAY PASS. The specification recites that—

* * * the central anvil piece has no central aperture, is as wide as the fulminate filled chamber, and the perforations are at the extreme outer sides of this fulminate for two purposes. One is to diffuse the fire from this center most thoroughly. THE OTHER IS TO HAVE AN UNPERFORATED ANVIL OVER AND AGAINST THE FULMINATE * * * TO RECEIVE THE CENTRAL BLOW OF A STRIKER AND OBTAIN COMPLETE RESISTANCE BY THE ANVIL BAR, AND YET HAVE FREE ESCAPEMENT FOR THE EXPLOSIVE FORCE AT ONCE FROM BENEATH THE ANVIL PLATE without any chamber or space for it to expand into under the plate.

The drawing of the patent shows the fulminate chamber located immediately beneath the central solid bar of the anvil and two side openings for the passage of the explosive force of the fulminate. It is impossible to construct an anvil having the characteristics called for by the original third claim, to wit, perforated into a central fulminate chamber, leaving a central unperforated bar over the fulminate chamber, without running into the teeth of the claim of the patent. "Two openings whose inner edges nearly coincide with those of the central chamber of fulminate" is merely another form of expressing the same invention as that covered by the original third claim. Whatever distinction exists is one of expression and not of substance. The invention is the same in both instances. The patentee, both in the original third claim and in the claim of the patent as allowed, sought to protect an anvil having a central solid portion and also openings into a fulminate chamber beneath such solid portion.

THE DEFENDANT'S CARTRIDGE SHOWS IDENTICALLY THE SAME ELEMENTS, to wit, an anvil having a central solid portion directly over the fulminate, and two side openings through which the explosive force of the fulminate is free to pass.

On page 35 of the transcript of record the drawing "United States Army Service Cartridges" shows the solid part of the anvil marked *e*, the fulminate chamber marked *g*, and two side openings through the anvil marked *f f*.

Whatever difference there is between the patentee's cartridge and that of the defendant RELATES TO THE CONTROL OR DISSEMINATION OF THE EXPLOSIVE FORCE AND NOT TO THE MECHANICAL CONSTRUCTION BY WHICH THE EXPLOSION IS INDUCED. The invention protected by the patent resides in this construction and not in a function resulting therefrom. In the cartridge of the patentee and in the defendant's cartridge the anvil is constructed "to receive the central blow of a striker;" "complete resistance by the anvil bar" is secured, "and yet have free escapement for the explosive force at once from beneath the anvil plate."

The fact that the explosive force after passing through the two side openings in the anvil of the defendant's cartridge is controlled in its entrance to the powder charge by improved means does not free the cartridge of the charge of being an infringement of the patent in suit.

The fact that the part changed, in a patented combination, works better in the location where the defendant puts it than where the complainant put it makes no difference if it does the same work, though in a better degree. The result is the same.

Adams *vs.* Joliet Mfg. Co., 3 B. & A., 1.

It is well settled that the addition of a mere improvement does not free the device from the charge of infringement of a prior patent if the elements of that prior patent are used in the improvement.

McCormick *vs.* Talcott, 20 How., 402.
Chicago & N. W. R. R. Co. *vs.* Sayles, 97 U. S., 554.

The one fundamental feature for which Hubbell was contending was the production of an anvil having solid metal directly over the fulminate chamber, and which at the same time would be provided with openings so arranged as to allow of the passage of the explosive force of the fulminate without impairing the strength or stability of the anvil itself.

All of these characteristics are present in the Government's cartridge. The solid portion of the anvil is directly over the fulminate chamber, and the openings for the passage of the explosive force of the fulminate are at opposite points or on either side of the central solid part. Whether the Government's cartridge provides additional means for subsequently controlling the passage of the explosive force after it passes through these side openings from the fulminate chamber is immaterial. The fact that a face groove connects these two side openings, and that the flame is diffused into the powder chamber in a central stream after leaving this groove, should not control the determination of the question of infringement.

It is again respectfully submitted that IN THE GOVERNMENT CARTRIDGE IS TO BE FOUND EACH AND EVERY ELEMENT OF THE CLAIM OF THE PATENT. There is present in such cartridge, in the bottom of a solid metallic flange case or shell,

a circular base enclosing a central chamber of fulminate and an anvil over the fulminate provided with two or more openings, whose inner edges nearly coincide with the central chamber of fulminate in the base of the cartridge.

The coincidence of the openings is absolutely necessary to insure the passage of the explosive force of the fulminate from the fulminate chamber through the anvil, or at the sides of the central solid portion thereof, before entering the powder chamber.

At most it is a mere matter of degree how deep the side openings (marked *f f*, page 35, Transcript of Record) may be made. What is required is that these side openings have such relation to the fulminate chamber and to the central solid portion of the anvil that the explosive force of the fulminate will pass through these openings to get beyond the anvil in seeking access to the powder charge. *It must be borne in mind that although the anvil in the defendant's cartridge is contained within a cup which also holds the fulminate, the fulminate itself, and hence the fulminate chamber, is that part directly beneath the solid portion of the anvil, and with this chamber or fulminate-retaining space the inner edges of the side openings* (*f f*, page 35, Transcript of Record) *nearly coincide.*

Although the Government's cartridge may embody improved features over the Hubbell cartridge, yet nevertheless, as before pointed out, there is present in the Government's cartridge every element and characteristic of the Hubbell invention, combined and arranged relatively to each other and designed to operate in substantially the

same manner and under substantially the same conditions, as contemplated by the appellant's patent.

It is again respectfully submitted that the claim of appellant's patent as granted is as broad as the claim originally submitted. Whatever differences exist between the claims as made and allowed consist of mere changes of expression, made to meet the views of the examiners, but nevertheless having substantially, if not identically, the same meaning. Such changes of expression ought not to be permitted to defeat a meritorious claimant who is entitled to and should be accorded a fair construction of the terms of his claim as embodied in the patent granted. If the defendant's reloading cartridge, as contended, embodies within itself every essential element and feature of the appellant's invention combined and arranged and designed to operate in substantially the same manner under substantially the same conditions as is contemplated by the appellant's prior patented device, it would seem that neither a nice sense of justice nor the established principles of the patent laws of the United States as administered by this court should deprive the latter of the merited fruits of his inventive genius.

It is respectfully submitted that the judgment of the Court of Claims should have been reversed and judgment entered upon the findings in appellant's favor.

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